IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY S. ZIELONKA	:	**CIVIL ACTION**
	:	
v.	:	
	:	
TEMPLE UNIVERSITY	:	**NO. 99-5693**

M E M O R A N D U M

WALDMAN, J. **October 12, 2001**

I. Introduction

Plaintiff alleges that he was wrongfully denied tenure as a faculty member at Temple University because of his association with an African American professor for whom plaintiff voted in an academic election for department chair. Plaintiff asserts a Title VII claim against Temple, as well as supplemental state law claims for breach of contract and violation of the Pennsylvania Human Relations Act ("PHRA"). Presently before the court is defendant's Motion for Summary Judgment.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d

Cir. 1986). Only facts that may affect the outcome of a case are "material." See Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or conclusory allegations, such as those found in the pleadings, but rather must present evidence from which a jury could reasonably find in his favor. See Anderson, 477 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

From the evidence of record, as uncontroverted or otherwise viewed in a light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff was an assistant professor of French in Temple's Department of French and Italian from the 1989-1990

academic year until June 30, 1997. He was engaged pursuant to an employment contract which was renewed each academic year. As a faculty member, plaintiff was also subject to a collective bargaining agreement. The collective bargaining representative was the Temple Association of University Professionals ("TAUP"). He became eligible for review for tenure and promotion to associate professor in the 1994-95 academic year.

In the fall of 1989, Dr. Wilbert Roget, the only African American then in the Department of French and Italian, indicated his interest in running for Chair of the Department. In December 1989, Dr. Roget was approached by a colleague, Dr. James Mall, who suggested that there was a position available at Howard University he might wish to pursue rather than run for Chair and another Colleague, Dr. Marquita Noris, gave Dr. Roget the position announcement.

Dr. Roget was a candidate in the April 1990 election for Chair of the Department. His opponent was Dr. Charlotte Kleis. Plaintiff met with each candidate and concluded that Dr. Roget had "a clearer vision of what he would do as Chair." Plaintiff, Dr. Eric Sellin, Dr. Kathy Collins, Dr. Justin Vitello and Dr. Ruth Thomas voted in favor of Dr. Roget.[1] Dr. Noris and Dr. Mall voted for Dr. Kleis. Dr. Roget and Dr. Kleis each voted

[1]Dr. Thomas was on a committee of three professors which had "enthusiastically" recommended that Dr. Roget be hired as an associate professor seven years earlier.

for themselves. Upon the recommendation of the faculty, then Dean Lois S. Cronholm appointed Dr. Roget as Chair of the Department for a three year term from July 1, 1990 through June 30, 1993.

When Dr. Kleis learned that Dr. Roget proposed to replace him as Graduate Advisor with plaintiff, Dr. Kleis suggested to plaintiff that his vote had been "bought." Plaintiff understood Dr. Kleis to mean that plaintiff voted for Dr. Roget in exchange for this assignment.

As his term as Department Chair neared expiration, Dr. Roget decided to run for another term. On February 10, 1993, Drs. Kleis, Mall, Noris and Thomas wrote a letter to Dr. Roget in which they expressed their opposition to his candidacy and advised that Dr. Mall planned to be a candidate. They expressed criticism of "the way in which the department is managed." They accused Dr. Roget of fostering "political divisions in the department," pitting "you and the junior faculty on one side" against "the tenured faculty" on the other. They also noted the unfairness of requiring junior colleagues to choose between Dr. Roget and four professors who comprised a majority of the departmental personnel committee. Dr. Roget showed the letter to plaintiff.

Dr. Roget's opponent in the second election was indeed Dr. Mall. According to plaintiff, he was told by Dr. Manon Ress, who had joined the Department since the prior election, that she was told at a social gathering in early 1993 by "either Dr. Mall

or his wife" that her chances for tenure would depend upon how she voted in the upcoming election for Chair. This itself is incompetent hearsay evidence. The court will assume for purposes of the pending motion, however, that this could be presented in competent form by Dr. Ress based on a letter to President Liacouris she authored on May 5, 1996 in which she states she was told, albeit by someone not identified in the letter, that her prospect for tenure would be affected by her vote for Chair.[2]

The second election was held in the spring of 1993. Plaintiff, Dr. Vitello, Dr. Christopher Concolino and Dr. Ress voted for Dr. Roget. Dr. Noris, Dr. Kleis and Dr. Thomas, who had voted for Dr. Roget in the prior election, voted for Dr. Mall. Dr. Roget and Dr. Mall each voted for themselves.

Both elections were conducted by secret ballot. Some persons, however, had expressed their intentions and it could be discerned how others voted, in plaintiff's words, "by process of elimination."[3]

Given the apparent division in the Department and because Dr. Roget's reign as Chair was tumultuous, Dean Carolyn

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[2]Dr. Ress, however, has not confirmed plaintiff's suggestion that she left Temple because she felt she would be denied tenure. She states in her letter that she "resigned for personal reasons." She also attributed the animosity surrounding the election for Chair not to racism but to "the political situation in the Department."

[3]Plaintiff has not averred that he had announced his voting intention to others.

Adams decided not re-appoint Dr. Roget to the position. Dean Adams felt that it would be best to appoint someone new from outside of the Department. Dr. Kleis became interim Chair until Dean Adams appointed Betty Richards of the Department of German and Slavic to serve as acting Chair.

Although Dr. Roget did not lodge a complaint, there were protests about Dean Adam's decision. She then requested that the Office of Affirmative Action investigate the circumstances surrounding the decision not to reappoint Dr. Roget as Chair. The investigation was conducted by Dr. William Yates, the Assistant Vice President for Affirmative Action and an African American. He interviewed twenty-three individuals, including all members of the Department. Dr. Yates concluded in his report of May 16, 1994 that racism was not a factor in the decision not to reappoint Dr. Roget but that it was probably a factor in Dr. Roget's inability to perform as Chair.

After the Yates report, a faculty Committee of Inquiry was convened to investigate the suggestion of racism. The Committee consisted of Dr. Deirdre David of the English Department, Dr. Gregory Lorant of the Biology Department, Dr. Joseph Margolis of the Philosophy Department, Dr. Ronald Taylor of Psychology, Dr. Kariamu Weish-Asante of the African-American Studies Department and Dr. Howard Winant of the Sociology Department. The Committee considered Dr. Yate's report, gathered additional testimony and issued a report on December 12, 1994.

The Committee found that Dr. Roget engaged in "an unusually autocratic method of chairing" and "in alienating practices."[4] The Committee concluded that "there is no evidence to sustain charges that Dr. Roget was hampered in his performance by racism," but also that "it is impossible to say race played no part in the history of conflict between Dr. Roget and his colleagues" as "race plays an inevitable part in the way individuals respond to one another." The Committee opined that the Department was, however, plagued by "rancor, resentment and old grudges" and recommended that the Dean conduct a search for "an outside chair."

Dean Adams released an excerpted version of the Yates report which contained no names or comments attributed to any interviewee.[5] It is unclear from the record presented whether any portion of the Committee of Inquiry report was released prior to the final denial of tenure to plaintiff. It is clear, however, that no statement in the report is attributed to him and

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[4]Dr. Sellin testified that he considered himself one of Dr. Roget's "best friends" when he became Chair but that he was a "poor chair" and "demonstrated poor managerial skills, particularly with regard to the ability to relate to tenured faculty members of the Department."

[5]Dr. Yates testified that "I think if I remember correctly, Dr. Zielonka said that he had some concerns about his tenure process because of his support of Dr. Roget." Dr. Yates understood from plaintiff that "there was animus in the department" because he had supported Dr. Roget for Chair but it was "not necessarily based on race." Plaintiff "didn't elaborate" on the matter further during his interview.

that his name is mentioned only as one of various persons who were interviewed.

Following a national search for someone to chair the French and Italian Department, Dr. Marge Devinney was selected effective in the Fall of 1995. Dr. Devinney was a professor of German and in the Fall of 1995, the Department of French and Italian and the Department of German and Slavic were merged.

The departmental personnel committee which reviewed plaintiff's 1994-95 application for tenure included individuals who were displeased with Dr. Roget and voted against recommending tenure for plaintiff. Drs. Mall, Noris and Thomas recommended against tenure while Dr. Roget and Dr. Tim Corrigan favored tenure.

In this multi-level review process, the interim Chair of the Department and the Dean of Temple's College of Arts and Sciences then recommended against tenure and promotion for plaintiff. The College of Arts and Sciences Tenure Committee then recommended that plaintiff receive tenure. Given the split vote, three negative recommendations and one positive recommendation, a subcommittee of the Council of Deans made an independent review and ultimately voted four to two against recommending tenure. The Council of Deans then voted ten to two against tenure.

In response to this recommendation, plaintiff complained to then President Peter Liacouras in a letter in May 1995 that the review process was unfair and that there were "serious problems and conflicts within the Department that had adversely affected [his] review." Rather than forwarding the negative tenure recommendation to the Board of Trustees, President Liacouras discussed plaintiff's situation with Dr. Yates and asked that he investigate the matter. Dr. Yates concluded that plaintiff's support of Dr. Roget "could have been a factor" in the negative recommendation by the Department Personnel Committee regarding plaintiff's tenure. President Liacouras then decided that no further action should be taken on plaintiff's review and that it would be best to defer action on plaintiff's application for tenure until the next year.

Provost James England telephoned plaintiff to inform him the President had decided to "send the review back to the department for a new review, a de novo review." Dr. England also told plaintiff that the President would review the process upon completion to ensure it had been conducted fairly.

In a letter dated June 15, 1995, signed by the Provost and countersigned by plaintiff, the parties agreed upon a delay in plaintiff's tenure and promotion consideration until the 1995-96 academic year and, in the event of a negative decision, to employment for a final academic year in 1996-97. Plaintiff

agreed to waive and release any claim to tenure based on the extension of his employment during the 1994-95 and 1996-97 academic years. The letter provided that "[t]his agreement is subject to the written concurrence of the Temple Association of University Professionals" and contained a signature line at the bottom for "Arthur Hochner, President TAUP."

The second review again focused on the pertinent areas of scholarship, teaching and service. New evaluations of plaintiff's publications were utilized. Evaluations from the prior review which included negative comments were not resubmitted. New peer reviews of teaching and new student course evaluations were utilized. The participants in the process presented new Recommendation Sheets with new commentary and analysis. The College of Arts and Sciences Tenure Committee expressly noted in its evaluation that in response to plaintiff's concern and "political divisions in his department," it was scrupulous in its effort to be fair.

Drs. Kleis, Thomas, Noris and Mall participated in plaintiff's second review for tenure and promotion. They voted not to recommend tenure. There was also a new professor from outside the University, Dr. Devinney, who had assumed the position of Department Chair. She recommended against tenure. Indeed, the results at every level of the review process were negative. Plaintiff's teaching was found to be satisfactory and

his research better than satisfactory. This was deemed to be insufficient in terms of the desired level of distinction, although six outside reviewers selected to assess plaintiff's publications found them praiseworthy. The Board of Trustees voted to deny tenure to plaintiff and by letter of June 27, 1996, President Liacouris informed plaintiff that he had been denied tenure.

Plaintiff filed a twenty page complaint with the Faculty Senate Personnel Committee, an independent body with authority to review complaints about the tenure and promotion process, in which he challenged the fairness of the second review process. The Committee concluded in a report of December 4, 1996 that the process had been fair and that no further action was warranted. Plaintiff then detailed his complaints regarding the fairness of the process to President Liabouris. He responded in a letter of April 1, 1997 that he had carefully considered all of plaintiff's expressed objections and concurred with the conclusion of the Faculty Senate Personnel Committee. TAUP declined plaintiff's request to file a grievance.

Plaintiff's employment with Temple was terminated at the end of the 1996-97 academic year. Plaintiff began new employment with Assumption College in Massachusetts in August 1998. He received credit toward tenure for his eight years at Temple.

IV. Discussion

A. Associational Discrimination

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a) (emphasis added).

Federal courts have recognized Title VII claims for associational discrimination. See, e.g., Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986); Reiter v. Central Consol. Sch. Dist., 618 F. Supp. 1458, 1460 (D. Colo. 1985); Gresham v. Waffle House, Inc., 586 F. Supp. 1442, 1445 (N.D. Ga. 1984); Holiday v. Belle's Rest., 409 F. Supp. 904, 908 (W.D. Pa. 1976). Such claims, however, are predicated upon discrimination against a plaintiff because of his race.

In arguing that "it would be entirely illogical to require Dr. Zielonka to prove that discrimination was based on his own race," plaintiff misperceives the basis of an associational discrimination claim. The plaintiff's own race must have been as much a motivating factor in the defendant's adverse action as the race of the individual with whom he associated. See Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 884 (7th Cir. 1998) (key inquiry in associational race

discrimination claim “should be whether the employee has been discriminated against and whether that discrimination was 'because of' the employee's race”); La Rocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762, 773 (D. Neb. 1999) (plaintiff must show that “but for [his] race not being black he would not have been discriminated against because of his association” or that any discrimination he suffered “was a result of his race being different from” that of person he associated with); Reiter, 618 F. Supp. at 1460 (“underlying rationale” for associational discrimination claim “is that the plaintiff was discriminated against on the basis of his race because his race was different from the race of the people he associated with”); Gresham, 586 F. Supp. at 1445 (but for being white, plaintiff would not have been discriminated against on the basis of her marriage to a black man); Holiday, 409 F. Supp. at 908 (essence of plaintiff’s claim is that “because she was white as opposed to any other race she was the victim of employment discrimination”). In associational discrimination cases, it is the interracial nature of a relationship itself that motivates discrimination.

Plaintiff quotes a line from Johnson v. University of Cincinnati, 215 F.3d 561 (6th Cir. 2000) that “[p]laintiff need not have alleged discrimination based upon his race as an African American in order to satisfy the protected status requirement” to suggest that the race of a plaintiff in an associational

discrimination case is irrelevant. In support of the foregoing assertion, however, the Court in Johnson cites to a case from which it quotes parenthetically that "[w]here a plaintiff claims discrimination [in a Title VII action] based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race." Id. at 575.[6] It is correct that a plaintiff of any race may maintain a claim for associational discrimination, but the discrimination must be based on the difference in his race and that of those he

[6]Insofar as the Court in Johnson suggests that in an associational discrimination case the race of the minority individual is "imputed" to the plaintiff, the court cannot agree. The essence of the claim is that but for the interracial nature of his association, the plaintiff would not have been discriminated against. In Johnson, an African American plaintiff alleged that he was terminated from his employment for advocating enforcement of procedures to prevent discrimination in employment and pay against minorities and women. He had not framed his claim as one of associational discrimination, but rather claimed "protected status" under Title VII "as a person who advocates on behalf of women and minorities" and alleged he was terminated for such advocacy. See Johnson v. University of Cincinnati, 1997 U.S. Dist. LEXIS 23768, *26-27 (S.D. Ohio Dec. 18, 1997). While citing to several associational discrimination cases, the appellate court seems to have accepted and acted on this theory. See Johnson, 215 F.3d at 577 (plaintiff's "advocacy of hiring practices that do not discriminate" is "protected conduct under Title VII" for which he may not be "discriminated or retaliated against").

associates with.[7]

Plaintiff did not have the type of relationship with Dr. Roget that alone may reasonably support an assumption that plaintiff's race motivated the action he complains of. The cases in which courts have recognized a cause of action under Title VII have typically involved more substantial relationships. See

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[7]Plaintiff has not proffered and the courts have not articulated elements of a prima facie case specifically for claims of associational discrimination. Plaintiff correctly states that the traditional McDonnell Douglas formulation is not intended to be rigid or ritualistic, but rather a method for evaluating evidence which must be adapted to particular claims and circumstances. See Waldron v. SL Industries, Inc., 56 F.3d 491, 494 n.3 (3d Cir. 1995); Massarsky v. General Motors Corp., 706 F.2d 111, 118 n.13 (3d Cir. 1983). Plaintiff, however, then proceeds to assert only that a "prima facie case would require a showing that Dr. Roget was a member of a protected class" and that plaintiff was injured "from unlawful discrimination against Dr. Roget." This is not correct. It is not necessary to show that the person with whom a plaintiff associates is a member of a protected class per se, but only of a race different than that of the plaintiff. Although it may be instructive and is the major thrust of plaintiff's presentation, it is unnecessary for a plaintiff to show any discrimination against the person with whom he is associated. The essence of the claim is discrimination against a plaintiff "because his race was different from the race of the people he associated with." Reiter, 618 F. Supp. at 1460. Any formulation of a prima facie case of associational discrimination logically would have to include at least a modicum of evidence of a causal link between the adverse action complained of and the interracial nature of the relationship or association in question. See, e.g., Taylor v. Phoenixville School Dist., 184 F.3d 296, 306 (3d Cir. 1999) (prima facie case of disability discrimination includes showing of "adverse employment action as a result of discrimination" prohibited by ADA); Waldron, 56 F.3d at 494 (prima facie Title VII case includes evidence of termination in circumstances supporting inference of discrimination made unlawful by Title VII); Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995) (prima facie case of retaliation includes evidence of causal link between engagement in protected activity and adverse employment action).

Parr, 791 F.2d at 892 (interracial marriage); Chacon v. Ochs, 780 F. Supp. 680, 682 (C.D. Ca. 1991)(interracial marriage); Gresham, 586 F. Supp. at 1445 (interracial marriage); Holiday, 409 F. Supp. at 908 (interracial marriage); Clark v. Louisa County School Board, 472 F. Supp. 321 (E.D. Va. 1979) (interracial marriage). See also Robinett v. First Nat'l Bank of Wichita, 1989 WL 21158, *1-2 (D. Kan. Feb. 1, 1989) ("good friendship" of white plaintiff with black co-worker "insufficient to establish the type of relationship" necessary to support cause of action).

Plaintiff has not presented any competent evidence that he actively attempted to vindicate Dr. Roget's rights or protested against discrimination directed toward him.[8] It appears that plaintiff's relationship with Dr. Roget was that of friendly acquaintance and supportive voter in an academic election.

In any event, there is no showing or assertion that plaintiff was discriminated against because of his race. There is no showing or contention that but for his race, plaintiff would have been recommended for or received tenure. Accepting that some professors opposed Dr. Roget's reelection because he is

[8]Plaintiff was a witness in the internal investigation, however, there is no competent evidence that plaintiff conveyed to those investigating that Dr. Roget was discriminated against because of race. Moreover, there is no evidence that other members of the Department or any decisionmakers were aware of what plaintiff told interviewers during the investigation.

African American, there is no showing that their resentment of plaintiff for voting for Dr. Roget was because plaintiff is of a different race than Dr. Roget. To the contrary, there is every indication that these professors would have been displeased with the support of anyone for Dr. Roget for Department Chair, regardless of their race, nationality, age or gender.

B. Indirect Discrimination

Perhaps perceiving the problems with his associational claim, in his response brief plaintiff seems to recast his claim as one for indirect discrimination. Relying on Anjelino v. New York Times, 200 F.3d 73 (3d Cir. 1999), plaintiff argues that he is a "person aggrieved" by discrimination against Dr. Roget. As this court has recently held in a housing discrimination case, a white plaintiff may sue for an injury proximately caused by an act of discrimination against the African American target of that act. See Lane v. Cole, 88 F. Supp. 2d 402, 406 (E.D. Pa. 2000).

The question in Anjelino was one of standing at the pleading stage. The Court held that male plaintiffs had standing to sue for their loss of employment and seniority on a priority list resulting from defendants' gender discrimination against female co-workers. See Anjelino, 200 F.3d at 92. The male plaintiffs alleged that because hiring for work shifts would stop just before the names of women on the priority list were reached, males listed below those names would also not be hired. If true,

this would mean that but for defendants' discrimination against females, male plaintiffs would have received more employment opportunities and seniority.

The alleged discriminatory conduct against Dr. Roget is the denial of the position of Department Chair allegedly because of race.[9] This did not result in plaintiff's loss of tenure and promotion. Rather, according to plaintiff, that resulted from retaliation by professors angry about his voting decision. Even if Dr. Roget had been reappointed as Chair, it appears from plaintiff's evidence that he would have been similarly treated by those professors. If plaintiff had been removed before the vote to prevent him from voting for Dr. Roget, he may have a claim. If plaintiff's promotion was contingent on Dr. Roget's reappointment as Chair, he may have a claim. This, however, is not a case where someone shot through plaintiff to hit Dr. Roget. The shot for which plaintiff seeks redress was aimed at him.

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[9]The only evidence of race based animus against Dr. Roget is the suggestion of a colleague that he consider a position at Howard University rather than run for Chair and, if admissible, the opinion of Dr. Yates that Dr. Roget's race was probably a factor in his inability to perform well as Chair. The remark about Howard is ambiguous. Howard is a traditionally black university. It also appears that Howard had in fact recently posted a position in Dr. Roget's field and it is far from clear that the same suggestion would not have been made with regard to such a current posting of any university. The totality of evidence otherwise strongly suggests that, in the words of the Committee of Inquiry, plaintiff's department was plagued by "rancor, resentment and old grudges" resulting from petty political concerns and not racism. In any event, the court assumes for purposes of addressing the instant motion that one could find on the present record that Dr. Roget was a victim of racial discrimination.

C. Retaliation

Although not pled in his complaint, plaintiff contends that he has made out a claim for retaliation.[10] In an on the record exchange at the close of plaintiff's deposition, his counsel acknowledged that no claim for retaliation had been pled but opined that defendant should have been aware of the prospect of such a claim from what was pled. Plaintiff, however, never amended his complaint to assert a retaliation claim or sought leave to do so through this date. Defendant justifiably emphasizes this basic deficiency in addressing summary judgment but nevertheless discusses the putative claim to show that it cannot be sustained on the competent evidence of record.

Title VII prohibits an employer from discriminating against an employee because he has opposed any employment practice unlawful under that subchapter or made a charge, testified, assisted or participated in an investigation, proceeding or hearing under Title VII. See 42 U.S.C.

[10]Plaintiff first suggested the possibility of a retaliation claim in his response to defendant's motion to dismiss. The court then noted that it was not clear beyond doubt from the face of the pleadings that plaintiff would be unable to produce evidence which could entitle him to relief on this theory. At the dismissal stage, the test is whether a plaintiff has pled facts which may entitle him to any relief. Once discovery proceeds and by the summary judgment stage, a defendant is entitled to know precisely what claims and theories a plaintiff is pursuing.

§ 2000e-3(a). To establish a prima facie case of retaliation, a plaintiff must show that he engaged in protected activity, that he was subsequently or contemporaneously subject to an adverse employment action and that there was a causal link between the protected activity and the adverse action. See Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997); Barber v. CSX Distribution Servs., 68 F.3d 694, 701 (3d Cir. 1995); Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989), cert. denied, 493 U.S. 1023 (1990).

Protected activity includes informal protests to a superior about discriminatory employment actions. See Abramson v. William Patterson Coll., 260 F.3d 265, 288 (3d Cir. 2001); EEOC v. L.B. Foster Co., 123 F.3d 746, 754 (3d Cir. 1997); Sumner v. United States Postal Service, 899 F.2d 203, 209 (2d Cir. 1990) Protected activity encompasses complaints about discriminatory treatment directed at another employee. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996). Grievances about matters not made unlawful by Title VII, however, are not protected activity. See Walden v. Georgia- Pacific Corp., 126 F.3d 506, 513 n.4 (3d Cir. 1997), cert. denied, 523 U.S. 1074 (1998).

Plaintiff argues that he "provided evidence of racism as a witness in Dr. Yates' internal investigation" and cites to two exhibits. These exhibits, however, simply do not support

this contention. Plaintiff was one of twenty-three persons interviewed during the internal investigation conducted by Dr. Yates. There is no competent evidence of record, including the testimony of Dr. Yates, that plaintiff specifically complained to Dr. Yates or anyone in authority at Temple at the pertinent time about racial discrimination. Further, plaintiff has produced no competent evidence that anything he said in his interview with Dr. Yates played any role in his denial of tenure. The report summarizing the results of the investigation did not identify any specific respondent.

If plaintiff is suggesting that his mere participation in the internal investigation was protected activity, it was not. Activity protected under the participation clause of Title VII does not include participation in internal investigations. See E.E.O.C. v. Total Systems Services, Inc., 221 F./3d 1171, 1174 (11th Cir. 2000); Tuthill v. Consolidated Rail Corp., 1997 WL 560603, *4 (E.D. Pa. Aug. 26, 1997); Russell v. Strick Corp., 1997 WL 381584, *4 (E.D. Pa. July 9, 1997). See also Morris v. Boston Edison Co., 942 F. Supp. 65, 71 (D. Mass. 1996).[11] There also is no competent evidence of any causal link between plaintiff's participation in the internal investigation and the decision to deny him tenure.

[11]Temple's internal investigation was not related to any EEOC charge, investigation or proceeding. Dr. Roget never filed a formal complaint with the EEOC. He does indicate that he informally conferred with an EEOC counselor. This, however, was in 1995. The Yates report was completed on May 16, 1994 and the Committee of Inquiry report was completed on December 12, 1994.

Plaintiff's support for Dr. Roget in the academic elections is also not protected activity. Plaintiff testified that he supported Dr. Roget because he thought he was the best candidate and not in an effort to oppose perceived racial discrimination. There is no evidence that in connection with his vote plaintiff protested any discrimination against Dr. Roget.

D. PHRA Claim

The same standards and analysis are generally applicable to Title VII and PHRA claims. See Gomez v. Allegheny Health Serv. Inc., 71 F.3d 1079, 1083-84 (3d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); Griffiths v. CIGNA Corp. , 988 F.2d 457, 469 n.10 (3d Cir.), cert. denied, 510 U.S. 865 (1993). While there are no reported opinions involving associational discrimination claims under PHRA, the statute has the same because of "such" individual's race language as Title VII and the court believes such a claim would be addressed by the state courts in a manner consistent with Title VII jurisprudence. See 43 P.S. § 955(a). Moreover, the parties have agreed that the parallel Title VII and PHRA claims should be governed by the same standards and resolved in tandem.[12]

[12]In his brief plaintiff states "Dr. Zielonka agrees with Temple that the analysis required for adjudicating his claims under the PHRA is identical to a Title VII inquiry."

E. Breach of Contract

The letter agreement of June 15, 1995 was expressly "subject to the written concurrence of [TAUP]." The signature line for TAUP President Arthur Hochner is blank and there is no evidence or suggestion of written concurrence in any form by anyone authorized to act for TAUP. In the absence of such expressly required condition, there was no effective written agreement. See InfoComp, Inc. v. Electra Products, Inc., 109 F.3d 902, 905-06 (3d Cir. 1997); Franklin Interiors v. Wall of Fame Management Co., 511 A.2d 761, 763 (Pa. 1986). See also Shovel Transfer & Storage, Inc. v. Pennsylvania Liquor Control Board, 739 A.2d 133, 137 (Pa. 1999) (noting contract would not exist in absence of signature parties intended to require).

Plaintiff is thus free to argue than an oral contract existed based on the various representations and subsequent performance of the parties. See InfoComp, 109 F.3d at 907; Franklin Interiors, 511 A.2d at 762. The terms of the ineffective written agreement may still be evidence of the parties' intent. See InfoComp., 109 F.3d at 907.

Defendant maintains that the existence and terms of an oral agreement must be proven by clear and precise evidence. Defendant relies on Feret v. First Union Corp., 1999 WL 80374 (E.D. Pa. Jan. 25, 1999) in which the court did so state. See id. at *15. The Court in Feret cites to other district court

cases which in turn cite back successively to the others and ultimately to Browne v. Maxfield, 663 F. Supp. 1193, 1197 (E.D. Pa. 1987). See, e.g., Martin v. Safeguard Scientifics, Inc., 17 F. Supp. 2d 357, 368 (E.D. Pa. 1998); Gorwara v. AEL Inc., 784 F. Supp. 239, 242 (E.D. Pa. 1992). None of these cases, however, cite to any opinion of a Pennsylvania court holding that a heightened standard applies to proof of oral contracts generally.

Although defendant's contention regarding the burden of proof is unchallenged by plaintiff, the court believes that an employment related oral contract may be established by a preponderance of the evidence. See Robert Billet Promotions, Inc. v. IMI Cornelius, Inc., 1998 WL 721081, *13 (E.D. Pa. Oct. 14, 1998) (holding oral contract must be proved by preponderance of evidence and rejecting contention clear and convincing evidence is required); Steelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc., 862 F. Supp. 1361, 1365 n.6 (E.D. Pa. 1994), aff'd in part and vacated in part on other grounds, 63 F.3d 1267 (3d Cir. 1995), cert. denied, 516 U.S. 1172 (1996); Pinizzotto v. Parsons Brinkerhoff Quade & Douglas, 697 F. Supp. 886, 888 (E.D. Pa. 1988) (rejecting higher standard of proof and upholding finding of oral contract from preponderance of evidence).

Moreover, plaintiff's testimony of his conversation with the Provost, if credited, followed by the letter of June 15,

1995 and the conduct of the parties would be sufficient to prove by clear and precise evidence an oral agreement including a promise of a de novo tenure review in a process reviewed for fairness by the President.[13] In assessing whether plaintiff has presented competent evidence sufficient to sustain his claim of breach of this agreement, the court applies a preponderance of the evidence standard.

Plaintiff does not appear seriously to question that he received a "new" or "de novo review." In any event, it is clear from the record that he did. De novo means anew, without deference to any prior determination. Plaintiff's application for tenure was addressed anew without consideration of the earlier conclusions. Dr. Devinney confirmed that she took "most seriously that this is a review de novo." Plaintiff was

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[13]Defendant has not argued a lack of consideration, and the court will assume for purposes of adjudicating the instant motion that there was consideration although it is not altogether clear what benefit was conferred upon Temple or what detriment resulted to plaintiff. Temple received another year of plaintiff's services at the going rate of pay, but this does not appear to have been intended for its benefit. Plaintiff agreed not to claim automatic entitlement to tenure based on the extended years of employment granted to him. This appears to be Temple unilaterally offering to grant plaintiff a benefit on condition he not seek to use it against the University. Plaintiff arguably gave up an opportunity to pursue a grievance over the denial of tenure, but there is no indication TAUP would have agreed to file a grievance. The court will also assume that a promise of fairness is sufficiently definite and specific to be enforced, although what is fair is often subjective. See Engstrom v. John Nuveen & Co., 668 F. Supp. 953, 962 (E.D. Pa. 1987) (promise of "excellent treatment" insufficiently definite or specific to be enforced).

permitted to present further and current matters pertaining to the pertinent areas of scholarship, teaching and service. New evaluations of plaintiff's publications were utilized. Evaluations from the prior review which included negative comments were not resubmitted. New peer reviews of teaching and new student course evaluations were utilized. The participants in the process presented new Recommendation Sheets with new commentary and analysis.[14]

The essence of plaintiff's allegation of unfairness is that the Department Personnel Committee, which included Drs. Kleis, Mall, Noris and Thomas, should have been excluded and that its participation tainted the process. Assuming that Drs. Kleis, Mall, Noris and Thomas were antagonistic toward plaintiff, the competent evidence of record simply does not support plaintiff's supposition of taint. Others in the process were aware of plaintiff's expressed concern about these four colleagues and of the rancorous history of the Department. The College of Arts and Sciences Tenure Committee expressly noted in its evaluation that in response to plaintiff's concern and "political divisions in his department," it was scrupulous in its effort to be fair. The

[14]An ultimate decision itself to grant or deny academic tenure is inherently "judgmental and subject." Fields v. Clark University, 966 F.2d 49, 54 (1st Cir. 1992). It is often a decision to "prune the ranks -- sometimes ruthlessly" of those with "satisfactory performance" in favor of those of "superior achievement." Kuhn v. Ball State University, 78 F.3d 330, 331 (7th Cir. 1996).

independent Faculty Senate Personnel Committee reviewed and rejected plaintiff's claim that the second review process was unfair.

Moreover, there is no competent evidence that President Liacouris did not keep the promise to review the process upon completion to ensure it had been fair. In his letter of April 1, 1997 to plaintiff, President Liacouris states that he carefully considered plaintiff's complaint regarding the fairness of the process and concurred in the conclusion of the Faculty Senate Personnel Committee. Temple did not agree to ensure a tenure review process accepted as fair by plaintiff.

V. Conclusion

There is no competent evidence of record that plaintiff was denied tenure because of his race or the interracial nature of any relationship or association. One cannot reasonably find from the competent evidence of record that plaintiff was an indirect unintended victim of racial discrimination against Dr. Roget or that plaintiff's denial of tenure was proximately caused by the failure of Dr. Roget to obtain reappointment as Chair. There is no competent evidence of record that plaintiff engaged in protected activity under Title VII, let alone that he was denied tenure for doing so. Plaintiff has failed to sustain his Title VII and PHRA claims.

One cannot reasonably find from the competent evidence of record that plaintiff was denied a new or de novo tenure review. One cannot reasonably find from the competent evidence of record that President Liacouris failed to review the process after completion for fairness. What evidence on the point which has been presented shows is that President Liacouris, and others, carefully considered plaintiff's detailed critique of the review process and concluded it had been fair. Temple did not agree to a process deemed fair by plaintiff. Plaintiff has failed to sustain his claim for breach of contract.

Temple is entitled to summary judgment. Its motion will be granted. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY S. ZIELONKA	:	**CIVIL ACTION**
	:	
v.	:	
	:	
TEMPLE UNIVERSITY	:	**NO. 99-5693**

O R D E R

AND NOW, this day of October, 2001, upon consideration of defendant's Motion for Summary Judgment and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT is ENTERED** in the above action for defendant Temple University.

BY THE COURT:

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JAY C. WALDMAN, J.